

**United States Department of Labor  
BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
Washington, D.C. 20001**

**'Notice: This is an electronic bench opinion which has not been verified as official'**

DATE: July 10, 1997

CASE NO.: 95 INA 473

In the Matter of:

**HERBERT COTTRELL,**  
Employer,

on behalf of

**XIMENA CLAUDIA ROSAS,**  
Alien

Appearance: F. S. Abrams, Esq., of New York, New York.

Before : Holmes, Huddleston, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that Herbert Cottrell, Employer), filed on behalf of Ximena Claudia Rosas (Alien), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able,

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

### STATEMENT OF THE CASE

On October 21, 1992, the Employer applied for labor certification on behalf of the Alien to fill the position of "Domestic Cook." AF 15. The job requirements were two years of experience or two years in the related occupation of domestic worker, including cooking. The job to be performed included planning menus and cooking meals, baking and preparation of fancy dishes and pastries, as well as purchasing all foodstuffs. A special requirement was "Must be a non-smoker." <sup>2</sup>

**Notice of Findings.** In the October 20, 1994, Notice of Findings (NOF) the CO advised that certification would be denied, subject to rebuttal. AF 36. Said that (1) the duties required did not constitute full time employment in the context of the Employer's household; and (2) the experience requirement was excessive and restrictive, as the normal requirements for the related occupation of houseworker, general, is a maximum of three months training and/or experience. While the Employer's requirement for two years of experience in the job offered (Cook) met the Specific Vocational Preparation (SVP) requirement of one to two years or experience, the related experience requirement of two years as a houseworker was excessive.

Employer was directed to provide evidence that the position was full time employment, by providing the number of meals prepared daily and weekly, and the amount of household entertaining done in the twelve months prior to the filing of the application, if the Employer claimed that the need was because of frequent entertainment. Evidence that the Employer had employed a full time cook in the past was also requested. In addition Employer was instructed to reduce the experience requirements or in the alternative to demonstrate how that requirement arose from business necessity. The requirement that the worker "Must be a non-smoker" was also to be amended to indicate "No smoking on

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. In this case see: DOT No. **305.281-010 Cook (Domestic ser.)** Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

premises."

**Rebuttal.** In his rebuttal of December 5, 1994, the Employer cited **Henry L. Malloy** 93 INA 355 (Oct. 5, 1994), in support of its alternate work experience requirement. AF 43. Employer then agreed to change the non-smoking requirement, and said the meals in question would be prepared for himself, his other household worker, and his adult daughter, all of whom comprised this household. AF 42. Employer explained that if he had a cook capable of handling large dinners he would entertain more frequently at home than at restaurants. Employer included a daily proposed schedule for a cook.

In the Supplementary NOF dated December 12, 1994, the CO said Employer's rebuttal was incomplete, as he failed to include documentation of his entertainment schedule. AF 46. The CO also requested further explanation of the daily schedule, specifically noting that the four hours alleged to be needed for cleaning up from breakfast, preparation of menus, baking, and preparing and cleaning up after lunch for three people was an inordinate length of time and further explanation was necessary.

In a second rebuttal, which was dated January 9, 1995, the Employer said he disagreed with the CO's opinion that four hours a day to prepare menus, bake, prepare lunch, and clean up after lunch was "inordinate." AF 49. Employer added that he did not have a cook at the present time, and if there was free time in the morning, and less in the afternoon, food shopping could be done in the morning instead of the afternoon. Noting that he does not presently have a cook but that he had one twenty-five years ago, the Employer said he recalled that it was a full-time job. Reiterating that he entertains at restaurants about twice a month but would prefer to do so at home, however, Employer could not recall his entertainment schedule from 1991 to 1992, as the CO directed, as this period was more than two years ago. He added that "in reality, I am not claiming that I need to employ a cook on a full time basis because of frequent entertainment; the principal duties of the job are to cook for myself, my domestic worker, and sometimes my daughter." AF 48.

**Final Determination.** Certification was denied in the CO's Final Determination (FD) of January 25, 1995. AF 51. The CO's reason for denial was that the Employer had failed to present evidence that the job duties to be performed in this household, constituted full time employment.

## DISCUSSION

"Employment" is defined as permanent full-time work by an employee for an employer other than oneself, according to 20 CFR § 656.3. As the Employer bears the burden of proving that a

position is permanent and full time, he was directed to provide proof that this position was full-time within the meaning of the Act and regulations. No evidence or documentation of this fact was provided, even though Employer was given two opportunities to provide the evidence in the NOF and Supplementary NOF.

In his brief the Employer argued, "[A]s long as the Employer can and does pay for a 40 hour week a strict schedule should not be an absolute requirement." Full time employment is an element of proof under 20 CFR § 656.3, however. Labor certification was denied in **Jane B. Horn**, 94-INA-6 (Nov. 30, 1994), for example, where the CO questioned whether the position of Domestic Cook was full time and the employer only showed that the jobholder's typical forty hour week would include serving the two adult members of the household twenty-five meals, serving the two school age children twenty-five meals, the cook was required to perform food shopping, and minimal cooking was needed for entertainment. This Employer has provided even less detail, and has offered no documentary or other proof to support the claim that the position he offers is a full time position. It follows for these reasons that this Employer failed to provide adequate evidence to sustain his burden of proof. For these reasons we conclude that the Certifying Officer properly denied certification under the facts of this case. Accordingly, the following order will enter.

### ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

## BALCA VOTE SHEET

CASE NO.: 95-INA-473

HERBERT COTTRELL, Employer,  
XIMENA CLAUDIA ROSAS, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Holmes	:		:		:		:
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Huddleston	:		:		:		:
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Thank you,

Judge Neusner

Date: June 30, 1997.